PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

May 9, 2006

TO: PARTIES OF RECORD IN APPLICATION 05-02-027

Decision 06-04-074 is being mailed without the Concurrence of Commissioner Dian M. Grueneich. The concurrence will be mailed separately.

Very truly yours,

Angela K. Minkin, Chief
Administrative Law Judge

AKM:mal

Attachment

L/ice

Mail Date
05/09/06

Decision 06-04-074 April 27, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	A.05-02-027 (Filed on February 28,2005)

ORDER DENYING REHEARING OF DECISION (D.) 05-11-028

I. INTRODUCTION

In this Order we dispose of the joint application for rehearing of Decision (D.) 05-11-028 ("Decision") filed by The Utility Reform Network ("TURN") and the Office of Ratepayer Advocates ("ORA").[1]

In Application (A.) 05-02-027 SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively "Applicants") sought approval of the transfer of control of AT&T Communications of California and its related affiliates to SBC.

Neither SBC nor AT&T are regulated telephone companies within California. However, both holding companies own subsidiaries which are subject to public utility regulation by the Commission. SBC California is an incumbent local exchange carrier ("ILEC") and AT&T California as well as its California affiliates are

[1] Subsequent to filing the application for rehearing, Senate Bill 608 (Stats. 2005, ch. 440, § 1.) took effect renaming ORA as the Division of Ratepayer Advocates.

non-dominant inter-exchange carriers ("NDIECs") and competitive local exchange carriers ("CLECs").[2]

Under the proposed transaction, AT&T would merge into a newly formed wholly-owned subsidiary of SBC, specifically created for the purpose of the transaction. AT&T would be the surviving entity of the merger for legal purposes.

In D.05-11-028 we granted the transfer of control of AT&T Communications of California and its related California affiliates from AT&T to SBC subject to four conditions.[3] The four conditions as stated under the Decision are:

1) SBC shall, by June 30, 2006, cease forcing customers to purchase separately traditional local phone service as a condition for obtaining [digital subscriber line] DSL service (this condition is commonly known as a requirement to provide "naked DSL"). We further order that no later than June 30, 2006, SBC shall submit an affidavit evidencing compliance with this condition of the merger.
2) Applicants shall adopt the agreement that Applicants negotiated with The Greenlining Institute and Latino Issues Forum and as modified in this decision ("Greenlining Agreement"). Under the key terms of the Greenling Agreement the Applicants agree to:

    a) Participate in a statewide Broadband Task Force.
    b) Increase corporate philanthropy over the next five years. Philanthropy will increase to $15 million for years one and two. Philanthropy will increase yet again to $20 million for years three, four, and five. The total net increase in philanthropy from current levels is $47 million. SBC commits to direct at least 60% of this additional philanthropy to minorities and underserved communities.
    c) Make a good faith effort to increase the supplier diversity goal for minority business enterprises from the current 23% to 27% by 2010. To achieve this goal, minority supplier spending in California could grow to $40 million in 2006 and to $80 million by 2010.

[2] In this Order, the abbreviations "ILEC" refer to an incumbent local exchange carrier, "CLEC" refer to a competitive local exchange carrier, and "NDIEC" refer to a non-dominant inter-exchange carrier.

[3] Not including conditions previously imposed by the Federal Communications Commission ("FCC") approval of the transaction and upon which D.05-11-028 relies, in part, in reaching its determination. See *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control ("SBC/AT&T Merger Order*"), FCC WC Docket No. 05-65 (rel. November 17, 2005).

3) Applicants shall commit $9 million per year for five years in charitable contributions ($45 million total), to a non-profit corporation, the California Emerging Technology Fund ("CETF"), to be established by the Commission for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies by 2010. No more than half of Applicant's total commitment to the CETF may be counted toward satisfaction of the Applicants' commitment in the Greenlining Agreement to increase charitable contributions by $47 million over five years.

4) Applicants shall freeze for one year rates paid by current AT&T customers receiving DS1 or DS3 private network service. This rate freeze shall begin with the date that control is transferred.

In addition, for purposes of our review of the transaction, we determined that while the proposed transaction was subject to Section 854(a),[4] it was appropriate to apply Section 853(b)[5] to exempt the transaction from review under Sections 854(b)[6] and (c).[7]

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[4] Section 854(a) provides in pertinent part:

> No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. (Pub. Util. Code, § 854, subd. (a.).)

[5] Section 853(b) provides:

> The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers. (Pub. Util. Code, § 853, subd. (b).)

[6] Section 854(b) provides:

> Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross

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annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall find that the proposal does all of the following:

(1) Provides short-term and long-term economic benefits to ratepayers.

(2) Equitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.

(3) Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result. (Pub. Util. Code, § 854, subd. (b).)

[7] Section 854(c) provides:

Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall consider each of the criteria listed in paragraphs (1) to (8), inclusive, and find, on balance, that the merger, acquisition, or control proposal is in the public interest,

(1) Maintain or improve the financial condition of the resulting public utility doing business in the state.

(2) Maintain or improve the quality of service to public utility ratepayers in the state.

(3) Maintain or improve the quality of management of the resulting public utility doing business in the state.

(4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees.

(5) Be fair and reasonable to the majority of all affected public utility shareholders.

(6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility.

(7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.

(8) Provide mitigation measures to prevent significant adverse consequences which may result. (Pub. Util. Code, § 854, subd. (c).)

However, we also determined that consistent with past merger cases granting a Section 853(b) exemption, it was appropriate to use the criteria under Section 854(c) as guidelines for determining whether the transaction is in the public interest, and also to include a broad discussion of antitrust considerations.

On December 2, 2005, a joint application for rehearing was filed by TURN and ORA. TURN and ORA challenge the Decision on the grounds that: (1) it improperly exempts the transaction from review under Public Utilities Code Section 854;[8] (2) it commits legal error because it "cherry picks" particular Public Utilities Code Sections, imposes a new public interest standard, imposes a new burden of proof, and accords inappropriate weight to the Attorney General Opinion ("AG Opinion"); (3) it makes numerous errors with respect to Sections 1705 and 1757; and (4) it circumvents Rule 51 in its treatment of the settlement with The Greenlining Institute ("GL") and The Latino Issues Forum ("LIF").

Responses to the application for rehearing were filed by The Greenlining Institute and by SBC and AT&T (jointly).

We have carefully considered each and every argument raised in the joint application for rehearing and are of the opinion that good cause does not exist to grant rehearing. Accordingly, the joint application for rehearing of D.05-11-028 filed by TURN and ORA is denied.

II. DISCUSSION

A. Exemption from Section 854 Review

TURN and ORA contend that the Decision improperly grants a Section 853(b) exemption from the merger review standards under Section 854(b) and (c). TURN and ORA state this is a departure from all other decisions involving an ILEC merger, for which the Commission did conduct review of the proposed transactions under Section 854 (b) and (c). In particular, TURN and ORA contend the Decision errs

[8] All other section references are to the Public Utilities Code, unless otherwise stated.

because: a) exemptions are only permissible in "extraordinary circumstances;" b) the three justifications for the exemption stated by the Decision are inaccurate and unsupported; and c) it ignores compelling legal and policy reasons supporting Section 854 review. (TURN/ORA Rhg. App., pp. 6-26.) Each of these arguments is discussed below.

1. Circumstances Warranting Exemption from Section 854 Review

TURN and ORA argue that the Decision errs in granting an exemption from Section 854 review because it did not apply the proper test for granting a Section 853(b) exemption. TURN and ORA assert that the Commission must establish "extraordinary circumstances" to grant an exemption and that this same test applies for granting an exemption from approvals requested under both Section 851 and 854. (TURN/ORA Rhg. App., pp. 9-12.) This argument is incorrect.

TURN and ORA allege that the Decision takes an overly selective approach which cites only certain past Commission authority to support granting an exemption in this case. (TURN/ORA Rhg. App., p 13.) Yet in arguing that we should have used the "extraordinary circumstances" test, TURN and ORA almost exclusively rely upon exemption cases pertaining applications for approval under Section 851 – not merger cases approved under Section 854. Similarly, TURN and ORA simply enumerate cases in which the Commission has conducted a full Section 854 merger review to suggest a full review must also be performed in this case. TURN and ORA argue that we exercised our authority to exempt transactions from review pursuant to Section 853(b) in a "*carte blanche*" manner. However, this argument disregards the analytical approach which we previously authorized, and applied in this case, in granting Section 853(b) exemptions for merger applications.[9]

[9] TURN and ORA also allege the Decision claims to have "unfettered" power to grant an exemption. (TURN/ORA Rhg. App., p. 10.) However, this claim is not supported by D.05-11-028, which notes only the Commission's broad authority, case-by-case evaluation, and the application of established principles to grant an exemption. (D.05-11-028, p. 14.)

Our Decision relies on several cases which establish our broad discretion to grant a Section 853(b) exemption, when evaluated on a case-by-case basis, as well as cases illustrating where such exemptions have been applied to merger applications. (D.05-11-028, pp. 12-16, and fn. 26, pp. 19-23.) However, we noted three cases in particular to illustrate the current exemption test commonly applied in merger proceedings.[10] These cases applied three key principles in granting an exemption from Section 854 review: 1) does the transaction involve putting together two traditionally regulated telephone systems; 2) does the Commission exercise ratemaking authority as contemplated by Section 854(b) to allow allocation of benefits to ratepayers; and 3) do the requirements in Section 854(b)(1) and (2) fit to allow allocation of merger benefits or alternatively, have the involved entities grown under competitive forces at the sole risk of shareholders. (*Merger of MCI/BT* [D.97-05-092], *supra*, pp. 664-665.)

Our Decision notes these three principles and relies on them, though altering the descriptive headings of the text for our own discussion purposes. Nevertheless, our underlying factual inquiry corresponds to that of the prior decisions. (D.05-11-028, pp. 18-28.) Accordingly, the Decision reasonably relies upon an existing and applicable exemption test in this case.

TURN and ORA cite to *WorldCom Bankruptcy* to assert that merger cases do in fact apply the "extraordinary circumstances" test.[11] However, this assertion is

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[10] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certificated Subsidiaries That Will Occur Indirectly as a Result of the merger of MCIC and BT* ("*Merger of MCIC/BT"*) [D.97-05-092] (1997) 72 Cal.P.U.C. 2d 656, 1997 Cal. P.U.C. LEXIS 340; *In re Application of WorldCom, Inc. and MCI Communications Corporation for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.* ("*Merger of MCI/WorldCom*") [D.98-08-068] (1998) 81 Cal.P.U.C. 2d 704, 1998 Cal. P.U.C. LEXIS 912; and *In the Matter of the Joint Application of AT&T Corp., Meteor Acquisition Inc., and MediaOne Group, Inc. for Approval of the Change in Control of MediaOne Telecommunications of California, Inc. That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and MediaOne Group, Inc.* ("*Merger of AT&T/MediaOne"*) [D.00-05-023] (2000) __ Cal.P.U.C. 3d __, 2000 Cal. P.U.C. LEXIS 355.

[11] *In re Application of WorldCom Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of Sections 851 and 854 of the Public Utilities Code With Respect to its Bankruptcy Reorganizations ("WorldCom Bankruptcy")* [D.03-11-015] (2003) __ Cal. P.U.C. 3d __,

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somewhat misleading. In *WorldCom Bankruptcy*, we granted exemptions from review under both Sections 851 and 854. Accordingly, we did note the "extraordinary circumstances" test related to the Section 851 aspect of the case. (*Id.*, p. 6 (slip op.).) However, we also went on to discuss Section 854 review and used neither the "extraordinary circumstances" test nor the three principles enumerated in the above mentioned merger cases to grant the exemption. In *WorldCom Bankruptcy* we found four different factors relevant in granting the exemption: 1) the transaction changes no rates or terms of service for existing customers and the Commission retains full authority to review any such changes in the future; 2) the Company is taking extraordinary steps to change the practices of the past; 3) evidence that the transaction is in the public interest is strong; and 4) the Commission and the commissions of several other states have stipulated in the bankruptcy proceeding to use their best efforts to act on WorldCom's state applications by a specific date. (*Id.*, pp. 6-7 (slip op.).)

Then in *Merger of WorldCom/Intermedia*, we rejected any hard and fast rule applicable to exemptions and instead stated that Section 853(b) gives us discretion to decide on a case-by-case basis whether the exemption is appropriate.[12] In *Merger of WorldCom/Intermedia* we determined it was appropriate to apply another set of factors in determining to grant an exemption. Specifically, that: 1) at least as to the Internet backbone, the merger will simply preserve the status quo at least until subsequent transactions are concluded and the merger will preserve Intermedia as a player in the California market; 2) Intermedia primarily serves business customers, a market where there is a great deal of competition; and 3) Intermedia has a small number of customers, dollar revenues, and employees in California. (*Id.*, pp. 4-5 (slip op.).)

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2003 Cal. P.U.C. LEXIS 554.

[12] *In re Request of WorldCom, Inc. and Intermedia Communications, Inc., for Approval to Transfer Control of Intermedia Communications Inc. and its Wholly-Owned Subsidiary to WorldCom, Inc.* ("*Merger of WorldCom/Intermedia*") [D.01-03-079] (2001) __ Cal.P.U.C. 3d __, 2001 Cal. P.U.C. LEXIS 219, pp. 3-4 (slip op.).

Indeed, there is no one hard and fast test which must be applied in granting an exemption pursuant to Section 853(b). We have looked to differing factors, depending upon the particular facts of a case and the situation at hand. In this case we relied on a set of factors which we have repeatedly used in granting exemptions from Section 854 review. Accordingly, there is no legal error.

2. The Justifications for Exemption Under The Decision

TURN and ORA broadly argue that the three prong test used by the Decision to exempt the merger from Section 854 review errs because it is not based on the record, it is factually incorrect, and it does not consider the public interest. (TURN/ORA Rhg. App., pp. 15-16.)

As discussed above, the Decision granted a Section 853(b) exemption based on an evaluation of three principles similar to those used in *Merger of MCIC/BT, Merger of MCI/WorldCom,* and *Merger of AT&T/MediaOne*. The principles we evaluated in the Decision are: 1) specific characteristics of the merger applicants; 2) the state and impact on the market as a whole; and 3) the likelihood that competitive pressures and our regulatory regime will cause benefits achieved through the combination to flow through to customers. (D.05-11-028, p. 18.) The inquiry under these principles was conducted in a manner to comport with the principles in the prior merger cases where we looked generally to: 1) whether the transaction involves combining traditionally regulated companies; 2) the nature of the Commission's ratemaking authority; and 3) whether the allocation of benefits to ratepayers fits or whether the entities have grown under competitive forces at the sole risk of shareholders.

a) Specific Characteristics of the Merger Applicants

TURN and ORA contend the Decision's analysis under this prong errs because: 1) it cites no case where a Section 853(b) exemption has been granted in a transaction involving an ILEC, 2) most other merger transactions were relatively small

from a financial perspective, and 3) most other cases were non-controversial. (TURN/ORA Rhg. App., pp. 16-17.)

In analyzing the first prong, the Decision demonstrates how this transaction qualifies for exemption by noting facts such as: the holding companies which are the subject of this merger are not regulated by the Commission as public utilities; while the California subsidiaries of each company are regulated public utilities in California, none are subject to traditional cost-of-service rate regulation; all of AT&T's California subsidiaries are non-dominant interexchange carriers (NDIECs or CLECS); the proposed transaction does not involve acquisition of an ILEC; AT&T's California intrastate revenues are a small percentage of AT&T's total revenues; and SBC California's access lines account for only approximately one-third of SBC's total access lines. Thus, we reasoned that California interests are not uniquely affected. (D.05-11-028, pp. 18-23.) We also noted that AT&T has grown (and shrunk) under competitive market forces at the sole risk of its shareholders, as well as the fact that many services provided by the California subsidiaries of both SBC and AT&T are not subject to regulation by this Commission, such as interstate communications and information services. (D.05-11-028, pp. 24-27.)

The three arguments raised by TURN and ORA are not convincing for purposes of determining whether the first prong of the exemption test was met or whether it was lawful to exempt the proposed merger from Section 854 review. Accordingly, there is no legal error.

b) The State and Impact on the Market as a Whole

TURN and ORA contend the Decision's analysis under this prong errs because it improperly declined to review competitive issues on the grounds that the Opinion of the Attorney General on Competitive Effects of the Proposed Merger of SBC Communications Inc. and AT&T Corp. ("AG Opinion") resolved those questions. TURN and ORA argue the Decision dismissed the record in the proceeding, particularly

with respect to issues of market concentration and intermodal alternatives. (TURN/ORA Rhg. App., pp. 17-18.) This argument is flawed for several reasons.

The statutory requirement to assess the competitive effects of a merger exists only when the Commission conducts a full review under Section 854. Specifically, Section 854(b)(3) requires that the Commission find that the merger proposal:

> Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result. (Pub. Util. Code, § 854, subd. (b)(3).)

Because the Decision lawfully granted a Section 853(b) exemption, the statutory requirement to review the potential competitive effects of the transaction was not triggered in this case.

Nevertheless, in this case we did determine that despite granting the exemption, it was relevant to conduct a broad review of competitive issues. This approach is consistent with past Commission merger cases also granting an exemption. In conducting this broad review, it is reasonable to rely in great part on the AG Opinion because the Legislature specifically charged the Attorney General with responsibility for evaluating the issue for use by the Commission. Moreover, the law establishes that the Attorney General's opinion and advice is entitled to great weight.[13]

TURN and ORA are wrong that we ignored evidence in the record. Our Decision discusses the competitive issues for each relevant market, and identifies the conclusion of the Attorney General, the position of the applicants, and the positions of the other parties. The Decision then states the basis upon which we determined to accept or reject particular conclusions. (D.05-11-028, pp. 28-59.) It was not legal error, or without

[13] See *Moore v . Panish* (1982) 32 Cal. 3d 535; *Farron v. City and County of San Francisco* (1989) 216 Cal.App. 3d 1071; *Unger v. Superior Court* (1980) 102 Cal.App. 3d 681.

consideration of the record, to look to the AG Opinion. The AG Opinion was based on testimony and evidence in the record of this proceeding, relevant FCC precedent, and the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines and the April 8, 1997 revisions ("Merger Guidelines"). (AG Opinion, pp 2-3, 13-15.)[14] There is no basis to conclude we failed to review the competitive issues or consider the evidence in the record.

Finally, TURN and ORA reassert that their conclusions are correct with respect to mass market customers and intermodal competition, and argue we should have come to the same conclusion. (TURN/ORA Rhg. App., p. 18.) As discussed in Section III a) of this Order, our findings regarding these issues were well founded in record evidence, FCC precedent and the *Merger Guidelines.* TURN and ORA merely ask that we reweigh evidence in the record. We considered these issues and TURN and ORA's positions, and stated the reasons for rejecting those arguments. (D.05-11-028, pp. 30-42.) TURN and ORA offer no legal basis to require such a reweighing of evidence. Accordingly, for the reasons stated above, there is no legal error.

c) The Likelihood That Competitive Pressures and Regulatory Regime Will Deliver Benefits

TURN and ORA contend the Decision's analysis under this prong errs because it fails to determine whether the proposed transaction will produce short-term and long-term benefits as required by Section 854(b)(1). TURN and ORA argue that there will "likely" be no short-term benefits from the merger nor will there be market incentives to force the companies to pass benefits to ratepayers, thus the transaction is "likely" not in the public interest. (TURN/ORA Rhg. App., pp. 18-24.) As explained below, these arguments are without merit.

TURN and ORA predicate their argument on the position that we must apply Section 854(b)(1) to assess and allocate short-term and long-term benefits of the

[14] In this Order all citations to the AG Opinion, briefs, and exhibits refer to the public rather than redacted versions.

transaction. However, this argument is incorrect. Our Decision lawfully granted an exemption from Section 854 review. Thus, the statutory requirement to identify specific short-term and long-term benefits of the transaction under Section 854(b)(1) was not triggered in this case.

As previously discussed, the third prong of the exemption test generally looks to whether a finding and allocation of merger benefits fits or whether the entities have grown under competitive forces. In relevant past Commission merger exemption cases, this prong has been satisfied if the entities involved, or at least the acquired entity, is determined to have grown under competitive forces at the sole risk of shareholders without a captive ratepayer base.[15] Related to this prong, our Decision here finds that AT&T, the entity to be acquired in this case, has grown under competitive market forces at the sole risk of its shareholders and has no captive ratepayer base. (D.05-11-028, pp. 24, 100 [Finding of Fact 12.].) With this finding, we reasonably satisfied the three prong exemption test established under prior cases.

TURN and ORA do not allege that we failed to satisfy the established exemption test, but instead focus on our statements noting that the new regulatory regime under the New Regulatory Framework ("NRF") and the 1996 Telecommunications Act depends more on market forces than the distribution of benefits through traditional ratemaking mechanisms. (D.05-11-028, pp. 26-27.) The Decision states that we no longer retain traditional cost-of-service based ratemaking authority over the utilities as was in place when Section 854 was enacted, and thus surmises that the current price-cap based structure will force Verizon to achieve efficiency gains likely resulting in the distribution of benefits to customers. (*Id.*)

Focusing on that discussion, TURN and ORA cite to cases such as *Merger of Pacific Telesis/SBC* to point out that the Commission has allocated short and long-term

[15] See *Merger of MCIC/BT* [D.97-05-092], *supra,* p. 11 (slip op.); *Merger of AT&T/MediaOne* [D.00-05-023], *supra,* p. 18 (slip op.); *Merger of MCI/WorldCom* [D.98-08-068] , *supra,* pp. 10-11 (slip op.).

benefits since the inception of NRF.[16] In addition, TURN and ORA state that we have used a sur-credit mechanism to flow benefits to ratepayers during the time the NRF has been in place. (TURN/ORA Rhg. App., pp. 20- 21.) However, this argument is misleading.

First, it suggests that because some merger cases have allocated benefits subsequent to NRF, all merger cases must do so. The cases TURN and ORA rely on were standard Section 854 review cases. They did not consider whether granting a Section 853(b) exemption was appropriate and provide no guidance regarding whether an allocation of short and long-term benefits is required in such circumstances. That we may have allocated short-term and long-term benefits since the inception of NRF does not create a legal requirement to do so in all cases.

Second, it suggests the Decision relied solely on the comments regarding NRF and the current competitive market structure to grant the exemption. That is wrong. We concluded that the proposed transaction was exempt based on established exemption principles.

TURN and ORA are also mistaken that we did not allocate benefits because it is too difficult to do so. (TURN/ORA Rhg. App., pp. 22-23.) To make this claim, TURN and ORA quote snippets of the Decision language which states: "the difficulty of adjudicating the benefit amount" and "[a]ny such Commission calculation of merger benefits would be time-consuming, costly, and highly speculative." (TURN/ORA Rhg. App., p. 22.)

This language was taken from a larger discussion regarding Section 853(b) exemption principles in which we reflected upon a range of regulatory and competitive changes. In that context, we observed that the difficulty of adjudicating benefit amounts in the traditional manner can be demonstrated by the wide disparity of estimates provided by the parties, complications resulting from the international scope and scale of the

[16] *Re Pacific Telesis Group* ("*Merger of Pacific Telesis/SBC*") [D.97-03-067] (1997) 71 Cal. P.U.C. 2d 351.

companies involved in this case, and the fact that the companies offer services not regulated by the state. (D.05-11-028, pp. 26-27.) Making such an observation does not constitute legal error or establish that we relied upon this observation to make our determination. We granted an exemption from Section 854 review consistent with the relevant exemption criteria, and did not go on to assess specific short-term and long-term benefits because we were not required to do so.

TURN and ORA claim "the record shows" the proposed merger will "almost certainly" not produce short-term benefits, and thus will "likely" not be in the public interest. (TURN/ORA Rhg. App., p. 19.) For the reasons stated above, it was not necessary for the Decision to analyze short-term benefits.

In addition, TURN and ORA err in suggesting that the issue of short-term benefits is determinative of whether the transaction is in the public interest. (TURN/ORA Rhg. App., p. 19.) The issue of short-term benefits is found under Section 854(b)(1). The test for determining whether the transaction is in the public interest is separate, and found under Section 854(c). Whether the transaction will result in short-term benefits is not an element under that public interest test. Generally, we are not required to use this eight factor test where it has granted a Section 853(b) exemption. However, in this Decision, as in certain other decisions granting an exemption, we used the more inclusive eight factors as a guide to make a broad showing that the transaction is in the public interest. (D.05-11-028, pp. 59-87.) The Decision concludes that based on our examination of the eight criteria, the competitive impacts of the merger, and the proposals of other parties, the proposed merger is in the public interest. (*Id.*, also see p. 98.) However, it is properly considered apart from the issue of short-term economic benefits.

Finally, TURN and ORA cite to testimony each presented in the proceeding to argue that there are no market incentives to force the merged companies to pass along merger benefits to consumers. (TURN/ORA Rhg. App., p. 23.) In resubmitting this testimony TURN and ORA ask the Commission to reweigh the evidence in the record.

There is no legal basis to require such a reweighing. Accordingly, for the reasons stated above, there is no legal error.

d) Legal and Policy Reasons for Section 854 Review

TURN and ORA contend that the Decision errs because it ignores two controlling cases, which would require a full Section 854 review if applied to the SBC/AT&T merger proposal. These are *Merger of SBC/Telesis* and *Merger of GTE/Bell Atlantic.*[17] (TURN/ORA Rhg. App., pp. 24-26.)

These cases are not factually or legally controlling in this instance. *Merger of SBC/Telesis* involved SBC's acquisition of Telesis. After the merger, Telesis' subsidiary Pacific would continue as a subsidiary of Telesis. We determined that although the transaction was technically structured as a merger between the two holding companies, the primary reason for the merger was for SBC to acquire Telesis' subsidiary Pacific. Pacific represented over 90% of Telesis' assets as California's largest provider of local basic service. (*Merger of SBC/Telesis* [D.97-03-067], *supra,* pp. 364-365.) For that reason we determined to "pierce the corporate veil" and subject the transaction to full Section 854 review.

The circumstances here are clearly not comparable such as to warrant piercing the corporate veil. In *Merger of SBC/Telesis,* SBC stood to acquire a California subsidiary comprising almost all of Telesis' California assets. By contrast here, SBC's acquisition of AT&T's California subsidiary represents only a small percent of AT&T's total revenues. AT&T's international telecommunications services throughout the United States and global market represent the larger portion of its assets. According to SBC, it is the acquisition of these national and global assets that are the driving force behind the

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[17] *Re Pacific Telesis Group* ("*Merger of SBC/Telesis*") [D.97-03-067] (1997) 71 Cal. P.U.C. 2d 351; and *In the Matter of the Joint Application of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell Atlantic") to Transfer Control of GTE's California Subsidiaries to Bell Atlantic, Which Will Occur Indirectly as a Result of GTE's Merger With Bell Atlantic* ("*Merger of GTE/Bell Atlantic*") [D.00-03-021] (2000) 2000 Cal. P.U.C. LEXIS 398.

merger.[18] Thus, the Decision notes that the California interests are only a small portion of a much larger transaction, and one in which California's interests are not uniquely affected.[19] (D.05-11-028, pp. 9, 23) Because the facts involved in the proposed SBC/AT&T merger are distinguishable and because TURN and ORA offer no information or argument to establish how the treatment in *Merger of SBC/Telesis* is applicable here, this case is not relevant.

Merger of GTE/Bell Atlantic is also not dispositive for purposes of analyzing the facts of this case. Again, TURN and ORA offer no information to establish how the facts in *Merger of GTE/Bell Atlantic* are comparable to the transaction at issue here. In *Merger of GTE/Bell Atlantic*, the question of whether to grant a Section 853(b) exemption was not raised or considered. As such, the case is not meaningful regarding the application of Section 854(b) and (c).

Finally, TURN and ORA argue that this merger should have been subject to full Section 854 review because it has much larger and long-term implications compared with other mergers, in particular due to the concurrent merger proposed by Verizon and MCI. TURN and ORA argue this will cause a fundamental and historic shift in the competitive make-up of the industry. (TURN/ORA Rhg. App., p. 26.) However, this is a policy argument and does not establish that the Decision was unlawful. Thus, for the reasons stated above, TURN and ORA have failed to establish legal error.

B. "Cherry Picking," Public Interest Standard, Burden of Proof, and the Attorney General Opinion

TURN and ORA contend that the Decision errs because: 1) it "cherry picks" particular Public Utilities Code Sections in order to reach a preordained outcome; 2) it applies a new and never before used public interest standard; 3) it imposes a new burden

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[18] See AG Opinion, p. 30.

[19] Also see Joint Applicants' Opening Brief (and redacted version) dated September 9, 2005, pp. 28-29, stating that AT&T's California subsidiaries account for only a fraction of its total revenue, and that fewer than 5% of AT&T's employees are in California.

of proof at the end of the proceeding that intervenors had no opportunity to meet; and 4) it accorded too much weight to the AG Opinion. (TURN/ORA Rhg. App., at pp. 26-34.) Each of these arguments is discussed below.

1. "Cherry Picking" Public Utilities Code Sections to Reach a Preordained Outcome

TURN and ORA argue that the Decision errs by granting an exemption from Section 854 review, then conducting a public interest analysis under Section 854(c) and relying on the AG Opinion required under Section 854(b). TURN and ORA contend that no prior merger decisions apply the statutory provisions in this manner and thus the approach is inconsistent, arbitrary, and capricious. (TURN/ORA Rhg. App., pp. 26-27.)

TURN and ORA are incorrect in their evaluation of prior merger decisions. As already established in this Order, in prior merger exemption decisions we have used varying analytical approaches in evaluating public interest. We have similarly differed in whether we sought an AG Opinion.

Decision 05-11-028 followed the more conservative approach of the latter two Commission decisions by using the heightened public interest review as a guide despite granting the exemption. Such heightened review was not inconsistent with prior decisions, and not arbitrary or capricious as TURN and ORA claim. Similarly, while we need not have sought an AG Opinion regarding competitive effects, we did so consistent with past merger exemption decisions in which we took the fullest opportunity to review the issues. Accordingly, there is no legal error.

2. New Public Interest Standard

TURN and ORA contend that the Decision errs because it applies a highly restricted and never before used public interest standard. (TURN/ORA Rhg. App., p. 27.)

This initial allegation is patently wrong. As discussed in Section I b) iii) of this Order, the Decision used as its guide the eight factor public interest test reflected in Section 854(c), plus consideration of whether the transaction would result in adverse competitive effects. The Section 854(c) test is lawful pursuant to statute, and has been

used in various Commission merger decisions regardless of whether an exemption from Section 854 review has been granted.

TURN and ORA state there is a long line of Commission decisions which have established factors the Commission looks to when evaluating transactions. TURN and ORA do not themselves cite any particular cases, but generally refer to decisions discussed in the Alternate Proposed Decision of Commissioners Peevey and Kennedy ("Alternate PD," pp. 24-26.). TURN and ORA contend the Decision truncated the standards set out in these cases without explanation, in favor of the public interest factors in Section 854(c). (TURN Rhg App., p 27.)

TURN and ORA wrongly suggest that the referenced decisions established an extensive and/or controlling set of public interest criteria which were truncated by the Decision. In fact, the discussion in the Alternate PD enumerated a number of older decisions only to demonstrate that over the years the Commission has applied varying public interest tests in reviewing financial transactions. (Alternate PD, pp. 24-26.) A review of these decisions reveals that rather than applying a broad multi-factor test, the Commission generally determined to look at only one or two public interest criteria deemed relevant to the transaction. By contrast, the Alternate PD notes that under the more recent decisions, which the Decision chooses to rely on, the Commission has applied the broader eight factor public interest criteria under Section 854(c). Commission decision history reflects that over time the Commission has applied the public interest test it believed to be useful on a case-by-case basis. However, the test has reasonably evolved to achieve consistency with the statutory standard.

Finally, TURN and ORA contend the Decision failed to assess the alleged risks of the transaction and how those must be balanced against its benefits. TURN and ORA contend the Decision eliminated this assessment under the standard of review it "devised" under Section 854(c). (TURN/ORA Rhg. App., pp. 30-31.)

In presenting this argument, TURN and ORA cite to various excerpts of testimony they submitted in the proceeding which discuss issues related to market concentration and the assessment of benefits on a dollar-by-dollar basis. (TURN/ORA

Rhg. App., pp. 29-30.) As discussed in Sections II b) ii) and II d) of this Order, the Decision properly considered market concentration and competitive effects of the proposed transaction. As discussed in Sections II b) iii) and III e) of this Order, the Decision was not required to conduct a dollar-by-dollar benefits assessment. To the extent TURN and ORA contend there is a separate and distinguishable risk criterion as part of the public interest test, they have failed to identify any authority which establishes that such a risk assessment is required to achieve a lawful review. Moreover, by resubmitting excerpts of testimony, TURN and ORA ask the Commission to reweigh the record. No authority is provided to require such a reweighing. Thus, there is no legal error.

3. Burden of Proof

TURN and ORA acknowledge that the Decision properly states that the Applicants bear the burden of proof to demonstrate that the proposed transaction is in the public interest. However, they contend the Decision in fact errs because it shifts that burden by requiring parties to overcome the conclusions reached by the AG Opinion regarding competition. TURN and ORA also assert that the Decision does not contain the required findings that Applicants have met their burden to show the transaction will not harm competition. (TURN/ORA Rhg. App., pp. 31-33.)

Specifically, TURN and ORA take issue with the discussion approach used in the Decision which begins with the sentence "[w]e find no reasonable basis upon which to reject the Attorney General's Advisory Opinion." (TURN/ORA Rhg. App., p. 31.) Focusing on the use of this sentence, TURN and ORA assert that the Decision attempts to shift the burden of proof. This argument is without merit.

The Decision conducts an issue by issue assessment of considerations necessary to evaluate whether the transaction presents antitrust/competitive concerns in each relevant market. In introducing each market assessment area, we summarized the conclusions reached by the AG Opinion, and then summarized the positions of the applicants and other parties. Finally, we continued with a full discussion section. (D.05-11-028, pp. 28-59.) TURN and ORA ignore the fact that the format approach used in the

Decision is merely to state the conclusion at the outset for clarity. Following each such statement the Decision explains why we came to our conclusions when comparing the positions of the parties in relation to the advice of the Attorney General.

Further, contrary to TURN and ORA's claim, the Decision contains numerous findings and conclusions to support the determination that the proposed transaction will not adversely effect competition. (D.05-11-028, pp. 100-104 [Findings of Fact 15-44.], pp. 106-107 [Conclusions of Law 7-14.].)

TURN and ORA do not specify what individual conclusions are believed to be in error or why. Instead they broadly claim that the preponderance of evidence suggests that absent mitigating conditions, the merger will harm competition in virtually every California intrastate market. (TURN/ORA Rhg. App., pp. 32-33.) However, that TURN and ORA disagree with our conclusions does not establish that we failed to consider the evidence. The conclusions reached by both the Decision and the AG Opinion were based on a review of the record evidence and positions of the parties. In addition, we agreed that merger conditions were necessary in order to approve the transaction.[20] Accordingly, the Decision notes that SBC agreed to merger conditions imposed by the FCC as part of its approval of the transaction (D.05-11-028, pp. 26, 98.), and we imposed additional merger conditions as part of this Commission's approval. (D.05-11-028, pp. 107-109 [Ordering Paragraph 1.].) Because TURN and ORA have failed to establish that the Decision improperly shifted the burden of proof, there is no legal error.

4. Weight Given to the AG Opinion

TURN and ORA contend the Decision errs because it accords the AG Opinion too much weight in rendering its findings regarding the competitive affects of the merger. (TURN/ORA Rhg. App., pp. 33-34.)

[20] D.05-11-028 states that if the applicants failed to implement the merger conditions contained in the Decision, the proposed transaction could not be approved. (D.05-11-028, p. 2.)

It should be noted that we are not legally bound to reject a proposed merger even where the action may in fact violate anti-trust law,[21] nor are we required to seek the opinion of the Attorney General in exemption cases.

That said, in this proceeding, we sought the opinion of the Attorney General, which concluded that although the merger may adversely affect competition in markets for two types of special access services (DS1 and DS3), this effect can be mitigated by a one-year rate freeze for those services.[22] With respect to other markets the AG concluded that SBC and AT&T either compete in different telecommunications markets or entirely different sectors of the same markets, and thus the proposed transaction will not adversely effect competition. (AG Opinion, pp. 1, 31.) As previously discussed in Section I b) ii) of this Order, it is reasonable for the Decision to rely on the AG Opinion with respect to the competitive effects of the merger because the Legislature specifically charged the Attorney General with responsibility for evaluating the issue for use by the Commission. While TURN and ORA correctly state that there is no requirement that the Commission adopt the conclusions of the AG Opinion, it is also true that the law establishes that the Attorney General's opinion and advice is entitled to great weight. In weighing the AG Opinion, the Decision also took into account that the United States Department of Justice recently approved the proposed merger with results similar to that of the Attorney General. (D.05-11-028, p. 98.)

It was reasonable to accord great weight to the AG Opinion in this case because its conclusions are based on numerous meetings with the parties, materials requested pertaining to those meetings, and evidence submitted in these proceedings as well as the parallel FCC proceedings. In addition, the AG Opinion sought additional information from other members of the industry and government agencies, as well as an

[21] See *Merger of AT&T/MediaOne* [D.00-05-023], *supra,* p. 25 (slip op.); and *Merger of WorldCom/MCI* [D.98-08-068], *supra,* pp. 719-720.

[22] The mitigation recommended by the AG Opinion regarding potential effects to DS1 and DS3 services was adopted by D.05-11-028, pp. 107-109 [Ordering Paragraph 1, subd. (d).]

economics consultant. (AG Opinion, pp. 2-3.) Our Decision reflects that the AG's reasoning and conclusions were weighed against the information and positions presented by the parties. There is no basis to conclude that we simply deferred to the AG's conclusions without independent consideration.

TURN and ORA argue that the Decision errs because it refuses to consider the Herfindahl-Hirshman Index ("HHI") as required by the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines ("*Merger Guidelines*"). (TURN/ORA Rhg. App., p. 34.) However, this is not an accurate representation of the consideration given to the HHI in either the AG Opinion or the Decision.

The AG Opinion states that in analyzing the competitive effects of the merger it employed the approach embodied in the antitrust laws, including the *Merger Guidelines* and the April 8, 1997 revisions to the *Merger Guidelines* relevant for determining the effects on the relevant markets. (AG Opinion, pp. 13.) The AG Opinion specifically acknowledges that the *Merger Guidelines* require that the HHI be calculated as the analytic "starting point" in all merger reviews. (AG Opinion, p. 16.) However, it goes on to explain that the HHI, while useful in assessing mergers in static, dominant-firm industries, is not useful in this instance because with the possible exception of DS1 and DS3 special access services, SBC and AT&T have only a nominal share in the relevant markets for consideration. (*Id.*) The AG Opinion states that the HHI is less useful in predicting effects in regulated or highly dynamic industries or in mergers between firms supplying differentiated products. In reasoning that the HHI is not a useful indicator here, the AG Opinion reasons in part that SBC has a relatively minor presence in the relevant markets for both mass market (facilities-based) long distance and enterprise services, AT&T dominates neither of those highly competitive industries, and entry barriers are minor. In addition, AT&T has a nominal share of the relevant market(s) for facilities-based local exchange services, and its absence will have inconsequential effects on price and output levels. (*Id*.)

The Decision similarly considered use of the HHI analysis and provided specific reasons why we felt that the HHI did not provide a useful assessment of market

effects in this case. In addition to the reasons articulated by the AG Opinion, we noted that the AG Opinion determined that the relevant local market is that of facilities-based service providers to mass market customers. However, no HHI increase for that market will occur because AT&T has elected to exit the local market, and thus no longer provides price constraining competition to SBC. Further, AT&T provides UNE-L facilities-based services in local mass markets to a relatively small number of customers and has no plans to offer service to local mass market customers, facilities-based or otherwise, in the future. (D.05-11-028, p. 37.) The Decision also notes that TURN's calculation of dramatic increases in the HHI arise from its definition of the local market to include "resold" or "UNE-P" services, and that TURN fails to acknowledge that traditional competitive analysis looks to whether the merged entity can manipulate the supply of service, as well as recent precedents used by the FCC in examining telecommunications markets focused on facilities-based competition. Thus, the Decision concludes TURN's calculations are incorrect in part, because of recent FCC decisions phasing out pricing at UNE-P levels, as a result of which it no longer makes sense to include UNE-P resold service in the analysis of market shares. (D.05-11-028, pp. 37-38.)

The AG Opinion and our Decision consider the HHI, but provide specific reasons why it is not a useful predictor of market effects in this instance. TURN and ORA offer no legal basis to support an argument that the HHI must be used when it is considered, but determined not to be an accurate indicator of the competitive effects of the merger in question. Further, no legal basis is asserted to require the Commission to reweigh the record on this issue.

Finally, TURN and ORA argue that the AG Opinion ignores evidence they presented in their respective testimony. (TURN/ORA Rhg. App., p. 33.) This argument is without merit. TURN and ORA offer no basis to contradict the Attorney General's representation that it did review the evidence presented in the record of this proceeding (AG Opinion, pp. 2-3.), and it is merely a criticism of the AG Opinion which does not establish legal error in the Decision. Moreover, TURN and ORA fail to identify what testimony they believe was ignored. Instead they state only that the AG Opinion did not

cite to their testimony a sufficient number of times. (TURN/ORA Rhg. App., p. 33. fn. 65.) TURN and ORA offer no legal authority which requires any requisite number of citations, the absence of which constitutes legal error. Because TURN and ORA failed to establish that the Commission improperly relied upon the AG Opinion, there is no legal error.

C. Alleged Sections 1705 and 1757 Errors

TURN and ORA allege that the Decision makes numerous errors under sections 1705 and 1757 of the Public Utilities Code, because: a) the Decision's reliance on the AG Opinion's market definitions is flawed and not supported by the record; b) the Decision's reliance on the AG Opinion's focus only on facilities-based competition in local markets is flawed and not supported by the record; c) the Decision's reliance on the Applicants' data to support the finding that its local wireline market share is eroding is flawed and not supported by the record; d) the Decision's refusal to consider HHI Calculations as part of the analysis to assess competitive impacts of the merger is flawed and not supported by the record; e) the Decision's approach to "sharing" benefits with consumers under section 853(b) is flawed and not supported by the record; and f) the Decision's failure to assess whether the merger would provide short-term economic benefits is flawed and not supported by the record, and is inconsistent with the Decision's finding that the merger is in the public interest. Each of these contentions is discussed below.

As a preliminary matter, it should be noted that many of TURN and ORA's arguments here stem from a misunderstanding of the requirements of Sections 1705 and 1757. Although we are required by Section 1705 to include in our decisions "separately stated[] findings of fact and conclusions of law…on all issues material to the order or decision," we are "not required to make express legal and factual findings as to each and every issue or sub-issue raised by a party to a Commission proceeding."[23] Furthermore,

[23] See *In Re San Diego Gas & Elec. Co*. [D.03-08-072] 2000 Cal. PUC LEXIS 1136, pp. *20-21.

we find that TURN and ORA cast their arguments in light of an incorrect reading of Section 1757. Section 1757(a)(4) states that "review by the court shall not extend further than to determine" whether "[t]he findings in the decision of the commission are not supported by substantial evidence in light of the whole record." We have interpreted this "substantial evidence" standard as follows:

> Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed.[24]

The fact that our findings differ from those proffered by TURN and ORA does not mean that we refused to consider relevant evidence. As the Decision states: "Our rejection of TURN's argument stems not from a failure to review its evidence, but from a decision that finds the evidence weak and the analysis faulty." (D.05-11-029, p. 118.) The fact that TURN and ORA disagree with our conclusions in the Decision does not demonstrate legal error, and we are under no obligation to reweigh the evidence in response to TURN and ORA's allegations.

1. Market Definitions

TURN and ORA contend that the Decision adopts market definitions in the AG's Opinion, which allegedly have little or no support in the record, while ignoring the market definitions proposed by TURN and ORA. (TURN/ORA Rhg. App., pp. 34-37.) TURN and ORA give two examples of what they consider inappropriate market definitions. First, TURN and ORA take issue with the Decision's definition of "mass market" that includes residential and small business customers as falling into the same

[24] *In re USP&C* [D.03-04-062] (2003) 2003 Cal. PUC LEXIS 258, p. *14. See also, *TURN v. PUC* (1978) 22 Cal.3d 529, 538 ("findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence."); *City of Los Angeles v. PUC* (1972) 7 Cal. 3d 331, 351 ("When conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final.")

market. According to TURN and ORA, the Decision ignores evidence provided by TURN and ORA that small businesses and residential customers fall into separate submarkets, based on the criterion described in the AG's report: the ability for carriers to raise prices to one group of customers without those customers switching to another product at a lower price. TURN and ORA contend that lumping residential and small business customers into a single "mass market" runs afoul of the "smallest market" principle embodied in the *Merger Guidelines*.

Second, TURN and ORA fault the Decision for treating services to all business and governmental customers (other than the smallest "mass market" business customers) as falling into a single market –the "enterprise" market. According to TURN/ORA, the Decision's observation that this market is highly competitive with a large number and range of market participants ignores substantial record evidence that SBC and AT&T currently compete head-to-head for enterprise customers and both have significant shares of this market. TURN and ORA also fault the Decision for relying on non-California specific data in analyzing the competitive impact of the merger on this market.

We find that TURN and ORA's arguments are without merit for several reasons. First, as discussed above, there is no error by the Commission in giving great weight to the AG's Opinion. With regard to market definitions, we found that the AG's market definitions are reasonable and "follow[] standard antitrust analysis." (D.05-11-028, p. 30.) The AG's Opinion itself contains findings and conclusions that are based on the testimony and evidentiary record in this case and the AG's special expertise in evaluating competitive impacts. (AG Opinion, p. 3.) The AG's Opinion noted that the FCC, following the *Merger Guidelines*, determines a relevant product market by considering whether, if all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price. (AG Opinion, p. 15.) The AG's Opinion further states that defining relevant products by "rigid adherence to this process would, however, include 'each point to point calling route' [citation omitted] in the case of local and long distance services and every

building or fiber lateral in the case of special access services." (*Id*., citation omitted.) Therefore, the AG Opinion notes, the FCC aggregates all customers within a hypothetical product market facing the same competitive alternatives and recognizes two customer groups with similar demand patterns: the "mass market" (residential and small businesses) and the "enterprise market" (large businesses and government users). The AG Opinion, and our Decision, therefore do not "ignore" TURN and ORA's evidence concerning market definitions or fail to provide an explanation for their approach to market definitions. Instead, they find that "strict adherence" to the *Merger Guidelines* produces markets that are far too narrow to provide useful predictions about the behavior of buyers and sellers in those markets. (*Id*.)

Second, the AG's market definitions are based on testimony and pleadings filed in these proceedings, the services currently supplied by both the applicants, as well as the *Merger Guidelines* and FCC precedent. (*Id*., pp. 2-3, 14-15.) TURN and ORA's disagreement with these market definitions does not establish that the Decision's findings are not supported by substantial evidence.

In addition, many of TURN and ORA's contentions ignore some of the main findings in the Decision concerning the effect of the transaction on mass market competition –that AT&T has elected to exit the local market, and thus no longer provides price constraining competition to SBC. (D.05-11-028, p. 37-39; Findings of Fact 18-21, 29, 31-32.) In light of this finding, many of TURN and ORA's arguments concerning mass market competition are immaterial to the Decision and do not require separately stated findings of fact under Sections 1705 and 1757. TURN and ORA seem to argue that this determination would be different if for example, we defined "mass market" with separate submarkets. However, TURN and ORA's market definition provides a distinction without a difference. Whether the mass market includes both residential and small business customers, or is divided up into separate subcategories as TURN/ORA suggest, does not undermine our central finding that AT&T's business in serving all such customers is in irreversible decline. AT&T's future competitive significance is the same for each of these categories of customers. TURN and ORA provide no argument to the

contrary, and their argument for separate and distinct markets for residential and small business services provides no grounds for rehearing.

TURN and ORA's contention that the Decision's market definitions conflict with the *Merger Guidelines* also does not provide grounds for rehearing. In making this argument, TURN and ORA are essentially asking us to reweigh evidence concerning the differences in demand characteristics between various categories of residential and small business services. There is no legal requirement that we do so. Moreover, the *Merger Guidelines* are a "framework" for "determining whether a merger is likely substantially to lessen competition." (*Merger Guidelines* Section 0.1.) There is no legal requirement that we perform its analysis lock-step with the *Merger Guidelines*, and TURN and ORA cite no authority supporting the contention that failure to follow the precise steps in the *Merger Guidelines* constitutes reversible legal error.

In addition, the FCC has rejected the argument that small business customers must be analyzed separately from residential customers.[25] In evaluating the competitive effects of the SBC/AT&T merger, the FCC's analysis used market definitions similar to those used in the Decision, and included residential and small businesses in its definition of "mass market":

> The Commission has previously found that residential and very small businesses have similar patterns of demand, are served primarily through mass marketing techniques, purchase similar volumes and communications services, and would likely face the same competitive alternatives within a geographic market. Thus, we conclude that an analysis of market share of residential customers is likely to accurately represent SBC's position in the mass market.[26]

[25] The FCC has defined mass market customers as residential and small business customers that purchase standardized offerings of communications services. See e.g. *WorldCom/MCI* Order, 13 FCC Rcd at 18040, para. 24; *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68.

[26] See *SBC/AT&T Merger Order*, p. 47, n. 243.

TURN and ORA argue that the FCC's analysis for this market segment relies exclusively on data for residential customers and identifies separate product markets for local services, stand-alone long-distance services and bundled services. Although the FCC's analysis is based on residential customers in the SBC/AT&T merger case, the FCC also pointed to earlier cases where it treated residential and small business customers as part of the same mass market. (*Id*. citing *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries* ("*Bell Atlantic/NYNEX Order"*) (1997) 12 FCC Rcd 19985, 20016, para. 53 (discussing similarities between residential and small business customers); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking (1999) 15 FCC Rcd 3696, 3829, para. 293 (discussing similarities between residential and small business customers in the context of unbundling rules); *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines* ("*SBC/Ameritech Order"*) (1999) 14 FCC Rcd 14712, 14746, para. 68 (including residential and small business customers in the same market).) Even including separate product markets in its analysis, the FCC reached the same conclusion as this Commission and the Attorney General: that the merger will not adversely affect competition in the mass market. And although it may be possible to identify additional and narrower relevant product markets, we found that the evidence in this record appropriately supports the market definitions and delineations used here. Again, TURN and ORA are essentially asking us to reweigh evidence proffered to support their narrower market definitions.

Finally, TURN and ORA's arguments regarding the definition for "enterprise market" are similarly without merit. The Decision's findings with regard to the enterprise market are supported by substantial evidence. The Decision relied on evidence submitted by SBC and AT&T that there is a broad array of competitive providers for enterprise services. (D.05-11-028, p. 50, n. 108 (citing Joint Applicants, Ex. 78, pp. 59-

72; Ex 79, pp. 66-73.).) Again, the Decision did not "ignore" ORA's arguments that SBC and AT&T compete head-to-head for enterprise customers. The Decision discusses ORA's position, as well as the Applicants' position that SBC and AT&T offer complementary rather than overlapping services in this market. We ultimately found that although SBC and AT&T operate in the same enterprise market, they focus on different sectors of this market. (D.05-11-028, Finding of Fact No. 36.) The fact that the we disagreed with ORA and TURN's position does not demonstrate that we failed to consider their arguments. In addition to the AG's Opinion, there is evidence in the record supporting the conclusion that enterprise customers have multiple locations, nationally and internationally, and are served by competitors who compete nationally and internationally, so as to make it appropriate to examine the state of competition on a broader geographic scale. (See Polumbo (JAs) Ex. 14, pp. 16-17; Kahan (JAs) Ex. 43, p. 12; see also AG Opinion, pp. 20-21, citing SBC Response to FCC Request, 1.a., at 4 and Aron Reply Decl. at 69.) The fact that we did not find TURN and ORA's arguments or evidence persuasive does not constitute legal error.

2. Facilities Based Competition in Local Markets

TURN and ORA next contend that the Decision errs by relying on the AG's Opinion which focuses only on facilities-based competition in local markets. (TURN/ORA Rhg. App., pp. 37-40.) The Decision states that the AG's "focus on facilities-based competition in local markets [is] appropriate and consistent with the approaches commonly used to review transactions such as this." (D.05-11-028, p. 37.) According to TURN and ORA, the AG's Opinion cites only one authority relying on this approach, the FCC's 1998 decision concerning the WorldCom/MCI merger.[27] TURN and ORA argue that this FCC decision, which concerns two NDIECs, does not provide a relevant guideline for analysis of the effect on competition in the local exchange market

[27] See *In re Application of WorldCom, Inc. and MCI Communs. Corp. for Transfer of Control of MCI Communs. Corp. to WorldCom, Inc.*, ("*WorldCom/MCI*") Memorandum Opinion and Order, 13 FCC Rcd. 18,025 (1998)

between a dominant provider and its major existing rival. TURN and ORA further argue that the approach focusing on facilities-based competition only conflicts with the *Merger Guidelines* and later FCC decisions which include a broader range of competitors, such as resold and UNE-P lines, than the AG considered. TURN and ORA further argue that because of the focus on facilities-based competition, the Decision fails to consider the effect of SBC's acquisition of AT&T's current retail customer base on the future of mass-market competition in California, and fails to consider TURN's HHI analysis of the current retail markets for residential and small business customers. (TURN/ORA Rhg. App., p. 39.)

We find that TURN and ORA's arguments provide no basis for granting rehearing. The decision to follow the analytical framework set out in the *WorldCom/MCI* case is well reasoned and supported by substantial evidence. The AG's Opinion noted that in the WorldCom/MCI merger, the FCC assessed competition in the relevant market for transmission capacity because "once a firm has overcome the barrier of deploying a national fiber network, all the other capabilities necessary to provide wholesale services are readily available." (AG Opinion, p. 17, citing *WorldCom/MCI Order* para. 28.) The AG found that resellers did not affect the analysis because, in the absence of any barriers to entry into the resale market, resellers do not affect industry output, which is instead determined by the availability of facilities needed to serve the market. (Id., p. 17.) Therefore, the relevant focus was "source[s] of wholesale competition." (Id., citing Selwyn Reply Decl., at 119.) The AG found that the same principle applied in the instant case because AT&T resells UNE-P services to a significant number of California mass market customers, many of which reside or do business in SBC's service territories, and there are many CLECs which offer that "readily available" service. (Id.) The AG also found that while AT&T provides "UNE-L" service through its own local switches, it does so to a relatively small number of customers, and further found that cable companies and other facilities-based suppliers provide competitively priced VoIP service within SBC's service territory in California. (Id., citing Aron Decl., p. 28.) Accordingly, the AG included these facilities-based UNE-L and cable suppliers, but not resellers at the

competitive retail level. The AG further noted that AT&T will no longer be a price leader for the residential mass market services because of technological and regulatory changes in the mass market industry. (AG Opinion, pp. 17-18, citing Selwyn Reply Decl., p. 80; Aron Reply Decl., pp. 35-36; Polumbo Decl., pp. 4-6.)

TURN and ORA ignore these principles and instead focus on a case which involves an incumbent LEC where the FCC included resellers in its analysis. (See *In re Application of Ameritech Corp., and SBC Communications Inc., for Consent to Transfer Control* (rel. Oct. 8, 1999) Memorandum Opinion and Order, FCC 99-2791, CC Docket No. 98-141 ("*SBC/Ameritech Order*").) However, in that case, the FCC's analysis relied in part on the notion that Ameritech might have moved from resale to facilities-based entry. (*Id*. ¶ 81.) Here, we rejected arguments that AT&T may return to the local market as "speculation." (D.05-11-028, p. 37.) Moreover, TURN and ORA provide no legal authority which precludes us from using the analytical framework set out in *WorldCom/MCI*. As we explained in the Decision, TURN and ORA's argument stems from a fundamental disagreement over the regulatory environment and role of UNE-P in the local market. We noted that the AG's Opinion clearly links its restriction of the market to "facilities-based local services" to traditional competitive analysis that looks at whether a merged entity can manipulate the supply of the service. We further noted that the FCC's competition policy supports a facilities-based approach to competition, for it has recently eliminated UNE-P as a competitive entry mechanism and will phase out all pricing at UNE-P levels. (*Id*., p 38.)

As discussed, TURN and ORA's claim that the AG's Opinion conflicts with the *Merger Guidelines* also represents a fundamental disagreement in approaches to evaluating competition in this market. Consistent with the *Guidelines*, the AG's Opinion rejects undue reliance on HHIs and market share, noting that while HHIs are an analytical "starting point" in all merger reviews, the relevance of the calculation is highly dependent upon the structure of the industry, how rapidly it is changing, and the theory of competitive effects. The AG noted that HHI is less useful in predicting effects in regulated or highly dynamic industries or in mergers between firms supplying

differentiated products. (AG Opinion, p. 16.) Accordingly, the AG focused on barriers to entry. (*Id*., pp. 16-17.) The *Merger Guidelines* clearly support this approach in emphasizing that entry barriers are critical to a merger analysis. (See *Merger Guidelines* § 3.0.)

Ultimately, TURN and ORA's arguments are aimed at the Decision's conclusion that the transaction will not adversely affect mass market competition. However, there is substantial evidence in the record to support the Decision's findings that AT&T's mass market business is in an irreversible decline and that AT&T would have been in no position to put pricing pressures on SBC's services. (See, e.g., Aron Ex. 78, pp. 59-61; Aron Ex. 79, pp. 30-61; Polumbo Ex. 14, pp. 1-2, 5, 7, 15-16.) There is substantial evidence supporting the finding that virtually all competition related to UNE-P services will no longer be viable in the near future. (See, e.g., Aron Ex. 78, p. 13; Polumbo, Ex. 14, p. 4-5; see also TURN Opening Brief, p. 83 (discussing the "demise of the UNE-P pricing option"); see also TURN/ORA Rhg. App., p. 43 ("UNE-P service option is being phased-out").) TURN and ORA's response to our findings regarding the meaningfulness of AT&T's UNE-P based local mass market service is that "some other company might have acquired AT&T and retained its retail customer base." (TURN/ORA Rhg. App., p. 40.) Such speculation, however, does not demonstrate legal error in our decision.

TURN and ORA's claims regarding HHI calculations also ignore the specific discussion of their position on HHI in the Decision. Both the AG and this Commission concluded that HHI analysis would not be necessary or informative in this case, as it does not provide relevant insight into the dynamics of this market. (AG Opinion, p. 16; D.05-11-028, pp. 37-38.) We found that TURN's HHI analysis depended on its definition of the market, and found that the AG's Opinion was more consistent with standard economic analysis and more appropriate for the analysis of this market. (*Id*.) TURN and ORA's argument does not detract from our conclusion that HHI calculations are not useful or informative in this case, nor does it undermine our main conclusion that the transaction will not adversely affect competition in the mass market.

3. Local Wireline Market Share Eroding

TURN and ORA next contend that that the Decision's finding that SBC's local wireline market share is eroding is flawed and not supported by the record. (TURN/ORA Rhg. App., pp. 41-48.) TURN and ORA spend several pages arguing that they "conclusively" demonstrated that Applicants' claim concerning wireline service losses are misleading, but that the Decision adopted this finding with no resolution of TURN and ORA's contrary evidence, in violation of Sections 1705 and 1757. In a nutshell, TURN and ORA argue that their evidence shows that the net change in business line in-service capacity, the net change in primary residential lines considering SBC's own wireless facilities, its continued ownership of UNE-P facilities, and its own substitution of DSL for secondary residential lines reveals that SBC actually gained connections rather than lost them to competition. The reason TURN and ORA make this argument is to attempt to undermine our finding that the Applicants will be constrained from exercising monopoly power by intermodal competition. (TURN/ORA Rhg. App., p. 41.) TURN and ORA contend that various forms of intermodal competition, such as VoIP, should have been excluded from the relevant product market. According to TURN and ORA, the Decision relies upon speculation as to the potential penetration of intermodal services as evidence that their existence and functional substitutability for SBC wireline local services will be sufficient to constrain SBC prices or force SBC to flow-through economic benefits of the merger to California ratepayers.

We find that TURN and ORA are merely rearguing evidence and restating arguments already heard and rejected by us. As discussed above, Sections 1705 and 1757 do not require us to "resolve" contrary evidence. Substantial evidence supports our conclusion that intermodal alternatives compete with wireline services. (See, e.g., Joint Brief of Applicants, pp. 53-56; Aron Ex. 78, p. 20-33; Kahan Ex. 43, pp. 5-6, 9.) This evidence comes not only from the Applicants' testimony, but also from competitors in the proceeding acknowledging the competitive significance of intermodal competition. Pac-West noted that "[v]oice and data network traffic is growing rapidly and is expected to reach more than 80% of all traffic by 2007." Qwest also informed the investing public

that it "expect[s] technology substitution such as wireless substitution for wireline telephones, cable telephony substitution for wireline telephony and cable modem substitution for dial-up modem lines and DSL to continue to cause additional access line losses." Qwest also attributed its revenue decline largely to its "continued loss of access lines, which is a result of increased competition and technology substitution (such as wireless and cable substitution for wireline telephony)." (See, e.g., Ex. 115 Pac-West Investor Data Sheet, p. 1; Ex. 120 Qwest's SEC Form 10-Q, pp. 2, 5.) The fact that we found this evidence concerning intermodal alternatives convincing, rather than TURN and ORA's evidence, does not render the Decision "speculative." Ultimately, TURN and ORA's arguments do not diminish the relevancy of our conclusion that "if AT&T is providing no significant telecommunications services in a market except through the resale of SBC services through UNE-P, which the FCC is in the process of eliminating, then consolidation with SBC should not affect the supply of telecommunications service to the market in any way." (D.05-11-028, pp. 38-39.)

4. HHI Calculations as Part of the Analysis to Assess Competitive Impacts of the Merger

TURN and ORA contend that the Decision fails to perform or consider any HHI analysis in its competitive analysis as required by the *Merger Guidelines*. According to TURN and ORA, given that the TURN/ORA HHI analyses were the only record evidence on the issue of concentration, the Decision violates Sections 1705 and 1757 by failing to consider this evidence. TURN and ORA argue that, at a minimum, if the Decision dismissed this evidence, it should provide a "reasonable explanation that is more detailed than the flippant accusation that TURN's approach was 'misguided.'" (TURN/ORA Rhg. App., pp. 47-48.)

TURN and ORA raised similar arguments with regard to the weight we gave to the AG Opinion, as discussed in Section II(d) above. As stated, the Decision, as well as the AG Opinion, explain why we found that an HHI analysis would not provide relevant insight into the dynamics of the local mass market and why it was not needed to perform a competitive analysis. Indeed, as the Decision explains "since the Advisory Opinion

finds that the relevant local market is that of facilities-based service providers to mass market customers, and since AT&T provides UNE-L facilities-based services in local mass markets to a "relatively small number of customers," and has no plans to offer service to local mass market customers, facilities-based or otherwise, in the future, then the acquisition of AT&T will produce no significant increase in the HHI for this market." (D.05-11-028, p. 37, citing AG Opinion, p. 17.) Although TURN and ORA argue that they have already shown the errors of focusing only on a facilities-based competition analysis, these arguments are without merit, for the reasons discussed above.

5. Sharing of Benefits Under Section 853(b)

TURN and ORA assert that the Decision errs because it imposed merger conditions without considering the conditions and benefits sharing they proposed in the proceeding. In addition, TURN and ORA state the Decision does not explain its own conclusion regarding potential benefits. Accordingly, TURN and ORA contend the Decision violates Section 1705. (TURN/ORA Rhg. App, pp. 48-49.)

As previously discussed, the Decision lawfully grants an exemption from Section 854 review. As a result, the Decision is not required to conduct the type of short-term and long-term benefits assessment TURN and ORA seek under Section 854(b). As the Decision notes, granting of a Section 853(b) exemption requires only that the Commission determine that the transaction is in the public interest, not that we conduct a dollar-by-dollar assessment and enumeration of benefits under Section 854. (D.05-11-028, p. 98.) Nevertheless, using Section 854(c)(6) as a guide, we did assess whether the transaction would be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility. (D.05-11-028, pp. 76-85.) We also considered benefits to be realized through the acceptance of merger conditions already imposed by the FCC's approval of the transaction. (D.05-11-028, pp. 26, 98.)

TURN and ORA are incorrect that the Decision ignores the merger conditions they recommended in the proceeding. Our Decision acknowledges that numerous conditions were proposed by the parties and, while not reiterating each and

every one, cites to the record where the relevant and often lengthy enumeration of conditions can be found. (D.05-11-028, pp. 88-94.) TURN and ORA suggest that we should discuss why each proposal was not meritorious. (TURN/ORA Rhg. App., p. 49.) However, as indicated by the Decision, there were pages and pages of conditions proposed by the various parties. We acknowledged our consideration of these proposals, and specifically discussed some of those determined to be most noteworthy. (D.05-11-028, pp. 88-94, 28-59.)

Further, apart from reasserting that we should impose a five-year rate freeze, TURN and ORA do not specify what conditions they ask to be imposed, nor do they present any legal basis to conclude the determination not to impose various recommended conditions constitutes legal error.

Contrary to TURN and ORA's claim, our Decision does explain our conclusions as to why benefits will flow to customers. As mentioned above, this discussion involved a broad analysis of benefits under Section 854(c)(6) and also took into account the already imposed FCC merger conditions and imposed its own additional conditions. (D.05-11-028, pp. 26, 76-85, 98.) The Decision explains in part, our reasoning of how merger benefits will be realized via economic benefits to Californians which will be received through the Greenlining Agreement (D.05-11-028, pp. 26-27, 76-85.). In addition, market forces under the current price-cap based regulatory structure and SBC's acceptance of merger-related conditions will help ensure benefits are realized by California customers. (*Id.*) As TURN and ORA acknowledge, the Decision finds:

> This transaction will likely produce significant cost savings and other synergies for the combined form. These transaction-related benefits will be passed through to customers through competition and market forces. (D.05-11-028, p. 100 [Finding of Fact 13.].)
>
> The transaction will be beneficial on an overall basis to state and local economies, and the communities in the areas served by the resulting public utility. Specifically, the merger will produce cost savings and other synergies that will be passed through to California customers through competition and market forces. The transaction will also result in the

> combined company's ability to offer a broader range of services, and more advanced services, to California consumers. The transaction will promote competition in communications in California, resulting in improved quality of service, more competitive prices, and greater technological innovation that will inure to the benefit of customers. (D.05-

TURN and ORA disagree with the findings and contend we should have discussed certain exhibits they presented to show there is a risk market forces will not result in benefits flowing to ratepayers.[28] (TURN/ORA Rhg. App., p. 49.) That we reached a different conclusion without specifically identifying the cited exhibits is not tantamount to legal error. The record reflects that there was substantial evidence upon which we based our conclusions, [29] and we did explain our theory of why benefits will be realized and make the requisite findings. TURN and ORA offer no legal authority requiring the Commission to reweigh the evidence on this issue. Therefore, the Decision does not violate Section 1705.

6. Short – Term Economic Benefits

TURN and ORA argue that the Decision errs because it fails to analyze whether the merger will provide short-term economic benefits pursuant to Section 854(b) and thus, violates Section 1705. (TURN/ORA Rhg. App., pp. 50-53.) This argument is essentially identical to the argument raised and addressed in above Section III e) of this Order. For the reasons stated in Section III e), there is no legal error.

In addition, however, here TURN and ORA expand on their prior arguments by resubmitting the recommendation that the Commission impose as a merger condition a five-year rate freeze, and restating disagreement with the conclusions reached by the AG Opinion and the Decision with respect to intermodal competition and potential market

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[28] TURN and ORA cite to Exhibit 126C, pp. 42-51.

[29] See Joint Applicants Opening Brief, pp. 16-25 and the cited supporting exhibits including: Exhs. 43, 14, 33, 15, 135, and 150.

concentration. There is no legal basis to require a reweighing of this evidence. Therefore, there is no legal error.

D. Rule 51

TURN and ORA contend that the Decision ignores the Commission's Rules of Practice and Procedure by failing to treat the "Greenlining Agreement" between Greenling and Latino Issues Forum ("GL/LIF") and SBC as a "settlement" pursuant to Rule 51. According to TURN and ORA, the agreement between GL/LIF and SBC was clearly called a "Settlement Agreement" by those parties, and was intended by those parties to be a "Settlement Agreement." Accordingly, TURN and ORA claim that Rule 51 procedures should have been followed, including notice, a settlement conference and opportunities for comments by all affected parties to any proposed settlement or stipulation. Rule 51.6 also provides for hearings when the provisions to a settlement are disputed. (TURN/ORA Rhg. App., pp. 53-54.)

According to TURN and ORA, the Commission merely asserted that the agreement is not a settlement because "we say it is not" and that "we have not given it the deference reserved for a Settlement." (TURN/ORA Rhg. App., p. 54.) However, TURN and ORA are committing the same fallacy that they argue the Commission is committing: TURN and ORA are insisting the document is a "Settlement Agreement" merely because it says it is, or merely because the parties called it a "Settlement Agreement."[30] TURN and ORA make no analysis as to why the contents of the agreement constitute a "settlement" under Rule 51. We did, however, make such an analysis in rejecting TURN and ORA's arguments that the Greenlining Agreement constituted a "settlement" under Rule 51. We noted that Rule 51(c) defines a "settlement" as "an agreement…on a mutually accepted outcome to a Commission proceeding." We further found that an

[30] We note that both SBC and GL/LIF filed oppositions to TURN/ORA's application for rehearing; neither agree with TURN/ORA's characterization of the Greenlining Agreement as a "settlement agreement" under Rule 51.

outcome to the proceeding would be a decision to approve or deny the application. (D.05-11-028, p. 84.)

Rather than constituting an agreement on the approval or denial of the merger, the Greenlining Agreement was an agreement between GL/LIF and SBC and their experts that SBC's participation in a broadband task force, targeting philanthropy, and contracting practices can address specific needs of California communities, and expressed GL/LIF's view "that this Agreement fully addresses and satisfies the concerns or allegations they have raised in connection with the Application." (Greenlining Agreement § 3.2.) As we correctly noted, the Greenlining Agreement did not constitute a settlement as to the outcome (i.e. the approval or denial of the application), but rather "constitutes little more than a common position by certain parties and their experts that offers an appropriate way to address issues of specific concern to California communities, including those issues known as 'digital divide issues.'" (D.05-11-028, p. 85.) Nor did the Greenlining agreement constitute a settlement with regard to an outcome on digital divide issues, as we added another condition to specifically address issues relating to the digital divide. Accordingly, we did not give the agreement deference reserved for a settlement, as that term is used in Rule 51. Nor did the Agreement preclude TURN or ORA from being heard on the proposal's merits or from advocating their own proposals for broadband connectivity, philanthropy, or supplier diversity. Indeed, we discussed TURN and ORA's substantive objections to the Agreement in our decision. (Id., pp. 75, 84-85.)

In short, the Agreement did not serve to terminate the proceeding or affect any other party's right to continue to assert its positions before the Commission, as such it was proper for us to find that the Agreement was not a "settlement" within the meaning of Rule 51.

III. CONCLUSION

For the reasons stated above, the joint application for rehearing of D.05-11-028 filed by TURN and ORA is denied because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.05-11-028 is denied.
2. This proceeding is closed.

This order is effective today.

Dated April 27, 2006 at San Francisco, California.

MICHAEL R. PEEVEY
President
JOHN A. BOHN
RACHELLE B. CHONG
DIAN M. GRUENEICH
Commissioners

Commissioner Brown reserves the right to file a dissent.
/s/ GEOFFREY F. BROWN
Commissioner

Commissioner Grueneich reserves the right to file a concurrence.
/s/ DIAN M. GRUENEICH
Commissioner

Dissent of Commissioner Geoffrey F. Brown

For the reasons stated in my earlier dissent in D.05-11-028, I remain unconvinced that this rehearing decision has addressed my and litigants' concerns about the procedural due process violations that permeated this proceeding.

For that reason, *inter alia*, I respectfully dissent.

Dated April 27, 2006, at San Francisco, California.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Commissioner